

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In The Matter of

**Review of Regulatory Requirements for
Incumbent LEC Broadband Telecommunications
Services**

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) **CC Docket No. 01-337**
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**COMMENTS OF
THE ASSOCIATION OF COMMUNICATIONS ENTERPRISES**

The Association of Communications Enterprises (“ASCENT”),¹ through undersigned counsel and pursuant to Section 1.415 of the Commission’s Rules, 47 C.F.R. § 1.415, hereby submits its comments in response to the *Notice of Proposed Rulemaking*, FCC 01-360, released December 20, 2001, in the captioned proceeding (“*NPRM*”). In the *NPRM*, the Commission seeks comment on “what regulatory safeguards and carrier obligations, if any, should apply when a carrier that is dominant in the provision of traditional local exchange and exchange access services provides broadband service.”² Interested parties are asked by the *NPRM* how the Commission can best balance the goals of encouraging broadband investment and deployment, fostering competition in the provision of broadband services, promoting innovation, and eliminating unnecessary regulation.”³ ASCENT submits that if the Commission were to create, as proposed by the *NPRM*,

¹ ASCENT is a national trade association representing smaller providers of competitive telecommunications and information services. The largest association of competitive carriers in the United States, ASCENT was created, and carries a continuing mandate, to foster and promote the competitive provision of telecommunications and information services, to support the competitive communications industry, and to protect and further the interests of entities engaged in the competitive provision of telecommunications and information services.

² NPRM, FCC 01-360 at ¶ 1.

³ Id. at ¶ 7

discrete regulatory safeguards and carrier obligations for incumbent local exchange carrier (“LEC”) provision of broadband services, focusing in so doing on broadband deployment goals, it may well hinder, and potentially thwart, realization of the Congressional vision of a fully competitive telecommunications marketplace.

As the *NPRM* recognizes, “incumbent LEC local exchange plant is used to provide services with very different competitive characteristics.”⁴ The plant that is used to provide local exchange and exchange access services to small business and residential consumers is also used to provide digital subscriber line (“DSL”) service. And there can be no dispute that incumbent LECs remain the dominant providers of local exchange and exchange access services to small business and residential consumers. Indeed, the Commission’s latest report on local telephone competition confirms that through the second quarter of last year, incumbent LECs, five years following enactment of the Telecommunications Act of 1996, continued to serve in excess of 90 percent of switched access lines nationwide.⁵ This figure, of course, understates the extent of the incumbent LECs’ market dominance today because it does not capture the impact of the spate of competitive LEC bankruptcies that occurred in the latter half of 2001 and the beginning of 2002, including, among others, the bankruptcies of Network Plus, McLeodUSA, Net2000 Communications, Ardent Communications, 360 Networks USA, and Teligent.

Competitive carriers in today’s telecommunications marketplace must provide a multiplicity of services in order to attract and retain customers. In addition to local exchange and exchange access services, a competitive LEC must provide its customers with a full suite of competitively priced interexchange services, including intraLATA, intrastate, interstate and

⁴ *Id.* at ¶ 6.

⁵ Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Local Telephone Competition: Status as of June 30, 2001 (February 2002).

international services. And critically for purposes of this proceeding, competitive LECs must offer their customers broadband services, as well. Hence, from a public policy perspective, the regulatory treatment of incumbent LEC provision of DSL services must be viewed in the context of the suite of services that competitive LECs must offer to small business and residential customers in order to remain competitive.

In enacting the Telecommunications Act of 1996, Congress identified as its principal goal “the opening of all telecommunications markets to competition.”⁶ This vision was to be realized by compelling incumbent LECs to provide physical interconnection with, and unbundled access to, their local networks, as well as discounted access to their local services for purposes of resale.⁷ Full access to the interLATA market was offered to the Bell Operating Companies both to incent and reward them for complying with these mandates.⁸ And “by opening all telecommunications markets to competition,” Congress sought to “accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans.”⁹ Finally, Congress anticipated that once competition had taken root and was flourishing in “all telecommunications markets,” full or partial de-regulation of telecommunications service providers, including the incumbent LECs, might be possible.¹⁰

⁶ S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996). “In 1996, Congress amended the Communications Act of 1934 with the purpose of fostering competition in both the interexchange and local exchange markets.” Southwestern Bell Telephone Company v. Federal Communications Commission, 153 F.3d 597 (8th Cir. 1998).

⁷ 47 U.S.C. § 251(c).

⁸ 47 U.S.C. § 271.

⁹ S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. at 1.

¹⁰ 47 U.S.C. § 160.

The *NPRM* scrambles the order of, and impetus for, these events, threatening in so doing the realization of the Congressional vision of a fully competitive telecommunications market. The *NPRM* seeks to advance relaxation of incumbent LEC regulation before achievement of full-scale local telecommunications competition. Moreover, the *NPRM* seeks to accelerate private sector deployment of advanced telecommunications and information technologies and services by means of such deregulation rather than through achievement of widespread local telecommunications competition.

ASCENT submits that the Telecommunications Act of 1996 must be viewed on a holistic basis and implemented in the order contemplated by Congress if the Congressional goals reflected in the Act are to be realized. If the de-regulatory ends that Congress sought to achieve by fostering the competition that would render some or all regulation unnecessary are implemented by regulatory fiat instead, the Congressional goal of “opening all telecommunications markets to competition” will be lost. Likewise, if the directive to “encourage the deployment on reasonable and timely basis of advanced telecommunications capability” is elevated above the mandate to open all telecommunications markets to competition and achieved through premature de-regulation, this Congressional vision will not be realized.

Congress could not have been clearer with respect to the order and means by which its statutory directs were to be implemented and its goals achieved. Far from a mandate for deregulation, the Telecommunications Act of 1996 was an intensely regulatory piece of legislation. The obligations and safeguards imposed on incumbent LECs by the Act were unprecedented.¹¹ Incumbent LECs were required to open their central offices and make available their networks and services to competitors at prescribed rates and on designated terms and conditions.¹² They were to facilitate entry by competitors into their local markets, providing interfaces and implementing operations support systems to this end. Only after these mandates had been fully implemented and their local markets had been irreversibly opened to competitive entry were they to be relieved of these new statutory obligations.¹³ And only thereafter were the regulations they had been subject to before passage of the Act to be relaxed.

¹¹ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (Second Report and Order and Memorandum Opinion and Order), 11 FCC Rcd. 19392, ¶ 1 (1996) (*subsequent history omitted*) (“The Telecommunications Act of 1996 fundamentally changes telecommunications regulation.”).

¹² Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Third Report and Order), 15 FCC Rcd. 3696, ¶ 3 (1999) (*subsequent history omitted*).

¹³ 47 U.S.C. § 160.

Likewise, the sequence for implementing Section 706 was clearly articulated by Congress.¹⁴ The Commission must first determine advanced telecommunications capability is being deployed on “a reasonable and timely basis,” and if it is not, the Commission must act. The obligation to act under Section 706, however, has not been triggered because the Commission has repeatedly found that advanced telecommunications capability is being reasonably and timely deployed.¹⁵ But if it had found otherwise, the Commission was directed by Congress to act to accelerate the deployment by “promoting competition in the telecommunications market,” not by taking actions which would hinder the development of local exchange competition.

Certainly, ASCENT understands the Commission’s desire to speed the availability of advanced services to all consumers in all parts of the Nation. No matter how laudable the end, however, the Commission is not free to ignore the mandates of Congress. The Commission cannot, and from a public interest perspective, should not, sacrifice local telecommunications competition in its zeal to prompt deployment of advanced services capability.

As ASCENT noted above, local telecommunications competition is in turmoil. Competitive LEC bankruptcies have become commonplace. The Commission has been flooded with applications to discontinue competitive local service as competitive LECs retrench or cease operations. Layoffs and downsizing seemingly occur daily. Investment and debt capital has dried up. Analysts use descriptive words such as “carnage” and “bloodletting” to describe the competitive LEC sector of the market. And initiatives in the Congress and before the Commission only serve

¹⁴ 47 U.S.C. § 157 note.

¹⁵ Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996 (Third Report), CC Docket No. 98-146, FCC 02-33 (February 6, 2002).

to fan existing fires.

As the Commission has recognized, competitors must be able to provide all the services provided by incumbent LECs at a comparable level of quality if they are to be effective

competitors.¹⁶ And, as the Commission has further acknowledged, limitations on a competitive provider's ability to offer DSL services to small business and residential customers "materially limits the scope . . . of competitive service offerings."¹⁷ Broadband services, as described by the *NPRM*, are "assuming an increasingly critical role in our economy and our everyday lives."¹⁸ As such, they are an essential component of a successful competitive LEC's suite of service offerings.¹⁹

¹⁶ Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina (Memorandum Opinion and Order), 13 FCC Rcd. 539, ¶ 82 (1997) (*subsequent history omitted*).

¹⁷ Deployment of Wireline Services Offering Advanced Telecommunications Capability (Third Report and Order), 14 FCC Rcd. 20912, ¶ 5 (1999) (*subsequent history omitted*).

¹⁸ NPRM, FCC 01-360 at ¶ 4.

¹⁹ As the bankruptcies of Northpoint Communications, Rhythms NetConnections, and Covad Communications confirm, survival in the telecommunications marketplace as a single product supplier, even of broadband services, is difficult, if not impossible.

In ASCENT's view, it matters not that "the provision of broadband services to residential customers is a nascent market," or that "cable providers, satellite providers, and terrestrial wireless network providers . . . [are] develop[ing] new services that are becoming increasingly substitutable for the broadband service provided over the traditional telephone network."²⁰ What matters is that five years following enactment of the Telecommunications Act of 1996, incumbent LECs remain dominant in the local telecommunications market, that competitive LECs are having an increasingly difficult time competing, and that DSL services are a necessary competitive tool for competitive providers. Before the Commission considers relaxation of regulatory oversight of incumbent LEC provision of DSL services, it must, consistent with Congressional directives, ensure that its primary obligation of facilitating local exchange competition has been fulfilled. Service convergence renders regulatory treatment of incumbent LEC provided DSL services separate from regulatory treatment of incumbent LEC provided local exchange/exchange access services unacceptable

By reason of the foregoing, the Association of Communications Enterprises hereby urges the Commission to refrain from relaxing the regulatory constraints now imposed on incumbent LEC provision of DSL service and to retain existing regulatory oversight of such services until Section 251(c) has been fully implemented.

Respectfully submitted,

**ASSOCIATION OF COMMUNICATIONS
ENTERPRISES**

By: _____/s/_____

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NPRM, FCC 01-360 at ¶ 4.

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